



September 28, 2000

Mr. Marcus L. Winberry
City Attorney
City of Conroe
P. O. Box 3066
Conroe, Texas 77305

OR2000-3757

Dear Mr. Winberry:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 139141.

The City of Conroe (the "city") received a request for information relating to a Conroe Police Department investigation of sexual harassment. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. You have submitted the responsive information for our review, labeled as exhibits C-M. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Chapter 143 of the Local Government Code encompasses civil service rules for municipal fire and police departments.

Section 143.089 of the Local Government Code sets out rules governing the content and release of two types of personnel files maintained by municipal fire and police departments. The first category is mandatory. "The director or the director's designee shall maintain a personnel file on each fire fighter and police officer." Local Gov't Code § 143.089(a). This mandatory file must contain "any letter, memorandum, or document relating to: . . . (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter" Local Gov't Code § 143.089(a)(2). Release of information contained in this mandatory file is governed by subsections 143.089(e) and (f) which state:

(e) The fire fighter or police officer is entitled, on request, to a copy of any letter, memorandum, or document placed in the person's personnel file. . .

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless release of the information is required by law.

Because information contained in this type of file may be released on the basis of other law or the person's consent, this information is not confidential and is, therefore, subject to the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

The second type of file described in section 143.089 is discretionary. "A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use" Local Gov't Code § 143.089(g). The information contained in a section 143.089(g) file is confidential. "[T]he department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer." *Id*; *see also City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

In this instance, the documents demonstrate that disciplinary action was imposed as a result of the investigation.¹ You state that exhibit M, a statement of the charges, is the only investigation related document that was forwarded by the department to the civil service commission. You explain that the other exhibits remain in department files for the department's internal use. However, after reviewing the submitted information, we find that all of the submitted information pertains to the investigation for which disciplinary action was imposed. As such, section 143.089(a)(2) requires the city to place the information in the officer's civil service file. Therefore, the remaining exhibits are not confidential under section 143.089(g).

You explain that the subject officer has appealed the disciplinary decision resulting from the investigation. You argue that exhibit M is confidential pursuant to section 143.089(c) during the pendency of the appeal of the imposed disciplinary action. We disagree. Section 143.089(c) provides for the removal of information from a person's personnel file if the disciplinary action was taken without just cause or if the charge of misconduct was not supported by sufficient evidence.² However, this subsection does not provide for qualified

¹Disciplinary actions specified under chapter 143 of the Local Government Code are removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051, 143.054, 143.055.

²Section 143.089(c) provides as follows:

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by Subsection (a)(2) shall be removed

confidentiality during the pendency of an appeal of imposed disciplinary action. We additionally note that section 143.089(c) indicates that documents relating to a disciplinary action must be maintained in the person's civil service file during the pendency of the commission's review of the appeal. Therefore, because exhibit M is maintained within the civil service file, it is not confidential and is subject to disclosure under the Act.

Although the exhibits are not excepted from disclosure under section 143.089(g), we note that a portion of the submitted information is excepted from public disclosure pursuant to section 552.101 in conjunction with common law privacy. Government Code section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common law privacy and excepts from disclosure private facts about an individual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by a common law right of privacy if the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and is not of legitimate concern to the public. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the El Paso court of appeals addressed the applicability of common law privacy to the files of a sexual harassment investigation. The court stated the following:

The character of some of the information sought [in a workplace sexual harassment investigation] is exactly the sort held excluded from disclosure under the privacy exemption. It involves names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages[,] and other highly personal material.

Id. at 524-25. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct, and conclusions by a board of inquiry. *Id.* at 525. The court ordered the release of the affidavit and the board conclusions. The court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements" beyond that contained in the released documents. *Id.* The court ordered the release of the affidavit of the person

from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause;

or

(2) the charge of misconduct was not supported by sufficient evidence.

under investigation and the summary of the investigation, stating that the public's interest was sufficiently served by the disclosure of these documents. *Id.* Thus, when there is an adequate summary of the investigation, the summary must be released, but the individual witness statements must be withheld. Conversely, this office has interpreted the holding in *Ellen* to imply that when an adequate summary does not exist, witness statements must be released. In either situation, however, the identities of the witnesses and victim must be redacted from the released information.

In this instance, the submitted information includes a summary of the investigation. Pursuant to section 552.101 and *Ellen*, the summary of the investigation, which has been submitted as exhibit M, must be released. In addition, the statement of the person under investigation, exhibit K, must also be released. *Id.* at 525. Because there is a legitimate public interest in the statement and the identity of the alleged harasser, the city may not withhold this information under section 552.101. Because the requestor is the complainant, the information relating to her identity may not be withheld from her on the basis of protecting her own privacy interests. See Gov't Code § 552.023(a). However, pursuant to *Ellen*, the identities of the witnesses to the alleged sexual harassment are protected by the commonlaw privacy doctrine and must be withheld. *Ellen*, 840 S.W.2d at 525. The remaining exhibits must be withheld.³

In summary, exhibits K and M must be released to the requestor after redacting the identities of the witnesses. The remaining exhibits must be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

³As section 552.101 is dispositive, we need not address your section 552.103 claim regarding exhibits D, H, I, J, and L.

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Julie Reagan Watson".

Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 139141

Encl. Submitted documents